No. 15865

In the United States Court of Appeals for the Ninth Circuit

WILLIAM CECIL POOL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF THE CASE

On October 5, 1956, appellant Pool and one Edward Ellis Clifton were indicted on two counts of violation of 18 U. S. C. 242. Count I charged that on or about February 27, 1956 they deprived one Ray Lewis Sage, Jr., of certain of his rights and privileges under the Fourteenth Amendment, in that, while acting under color of law, they beat him with a flashlight, fists and elbows and kicked him with their feet with the purpose and with the intent of depriving him of his constitutional rights. Count II alleged that on the same day appellant Pool deprived one Coite Martin Gaither, Jr., of certain of his rights and privileges under the Fourteenth Amendment, in that, while acting under color of law, he beat him with

fists and elbows and kicked him with his feet for the purpose and with the intent of depriving him of his constitutional rights.

The testimony adduced at the trial on behalf of the Government showed the following: Ray L. Sage, Jr., and Coite M. Gaither, Jr., were taken into custody on the morning of February 27, 1956. Detective Sergeant Victor L. Carlson of the North Las Vegas Police Department picked up Sage at his motel about 9 o'clock that morning (R. 51, 164). Gaither was taken into custody at his apartment between 10:30 and 11:30 a. m. of the same day (R. 129–130). Both victims in due course were taken to the North Las Vegas Police Department for questioning and subsequently Gaither was booked on a charge of vagrancy and burglary investigation (R. 48). The charge on Sage was burglary investigation (R. 48). Sage was intermittently questioned by appellant (who was then chief of police of the North Las Vegas Police Department) and others (R. 53, 54, 165), and so was Gaither (R. 133–134). When the questioning of Gaither proved fruitless, in that he denied participation in certain burglaries the police were investigating, he was ordered into a police car. Appellant got in beside him and detective Carlson was to drive (R. 134, 166). The three drove to a road by Nellis Air Base, turned off highway 91 on a gravel road and drove approximately a mile to a mile and a half to a big mound of dirt and stopped the car (R. 166, 134–135). During the trip appellant again interrogated Gaither about the burglaries (R. 167). When they arrived at their destination, appellant told Gaither to get out of the car and then struck Gaither

in the face (R. 167). Gaither continued to protest his innocence (R. 167). Appellant and Carlson both then beat and kicked Gaither a number of times (R. 136). Gaither was hit in the stomach area and kicked at the end of his spine and on the chest (R. 136). He was knocked down about six or eight times (R. 136–137). All during that time his hands were handcuffed behind his back (R. 137). Gaither was subjected not only to physical abuse but vulgarity and threats while the beating was being administered (R. 167–168, 135–138). After a while, when Gaither still maintained that he was innocent, appellant, Carlson, and Gaither got back into the car and returned to the North Las Vegas Police Department. They had been gone approximately 45 minutes to an hour. Ramona Wolf, wife and secretary of appellant corroborated Gaither's and Officer Carlson's testimony in this respect for she had seen appellant and Gaither go out to the car and had witnessed their return about an hour later. She stated that upon his return Gaither's face was very red and flushed (R. 212–213). When Gaither was subsequently admitted to the Las Vegas city jail, his stomach, neck, head and shoulders were "hurting pretty bad" (R. 142).

After Gaither had been returned to the police station, appellant told Sage to come outside to the car (R. 171). He there interrogated Sage further and in the course of the interrogation confronted him with Gaither and with the fact that he had been in a car with Gaither the night before (R. 171). Thereafter, appellant ordered Sage into the car, and Clifton, Carlson, and appellant also got in. Appellant

instructed Sage to get down on the floor boards of the back seat, threatening him with a pistol (R. 56–57, 171–172). They drove to the same location to which they had previously taken Gaither (R. 172). When they got out of the car appellant told Clifton to "work him over" (R. 172–173). Clifton started to hit Sage in the mouth and then beat him unmercifully with a flashlight (R. 172–174, 58). He struck Sage with the flashlight in the chest and abdomen between 25 and 100 times (R. 60, 173). Sage fell to the ground approximately 20 times begging Clifton not to strike him anymore (R. 61, 173). Appellant kicked Sage several times while the latter was down (R. 63, 173). Sage was handcuffed part way through the beating (R. 64, 173). Carlson testified that he warned appellant that an airplane flying overhead might see what was going on (R. 174). To avoid detection they drove to another place and continued to interrogate Sage (R. 174–175). Placing a pistol against Sage's temple, Clifton threatened to kill Sage if he did not tell the truth (R. 174–175). Sage repeatedly protested that he was not involved in the burglary job (R. 175).[1]

The group then returned to the car and drove back to the rear of the North Las Vegas police station and appellant made arrangements to have Sage booked in the Henderson jail (R. 175–176). During the trip back Sage appeared to be hurt about the mid-section (R. 175). Officers Clifton and Carlson drove Sage

[1] Photographs of the area where the beatings were administered were identified at the trial by Carlson (R. 168) and by Gaither (R. 159–163).

to the Henderson jail at which time Clifton made a request that he have no phone calls, no visitors and that he be placed in maximum security (R. 122, 176). When Carlson and Clifton returned to the North Las Vegas police station appellant ordered them to make a statement to the effect that Sage had received his injuries from jumping out of the police car (R. 177–178).

While in the cell at the Henderson jail Sage had a fainting spell and asked to see a doctor. He was examined by a physician (R. 71). Doctor J. B. French, a surgeon (and also the Mayor of Henderson) testified that he examined Sage. He discovered that Sage's mouth was bruised and that he had a dozen or fifteen large bruises over his chest and abdomen and smaller bruises around both wrists and one ankle. Sage had extreme difficulty in breathing. The doctor feared that Sage had a ruptured spleen and a fractured rib (R. 78–79). Medication was administered to stop any internal bleeding (R. 78). Dr. French testified that in his opinion the type of injury Sage had incurred could have been caused by a person attempting to get out of a moving vehicle only if he hit a pipe or gate pipe directly (R. 80). However, he thought it possible for the bruises he saw to have been inflicted by a flashlight (R. 81). In the opinion of Dr. French, Sage was not in good condition; he definitely had some internal injury; he required immediate hospitalization (R. 85). Sage was in severe pain (R. 84).

Several slides and photographs taken of Sage's injuries were identified (R. 218–219), and it was brought out that the photographs and slides accurately

portrayed the nature of Sage's injuries as they had been observed on March 1 (R. 222–224). The deputy Sheriff of Clark County reported that when he examined the upper body of Gaither on February 29th he observed yellow greyish bruises on his chest, lower stomach and on the back of his right shoulder (R. 222).[2]

Subsequently, the investigation into the burglaries continued. After further interrogation and confrontation with a bag full of money taken from one of the stolen slot machines Gaither admitted he had had something to do with the burglary. A search was made for some of the incriminating evidence (a crowbar and the pilfered slot machines). Gaither then was taken back to the police station where appellant attempted to implicate Gaither in other burglaries threatening him with "another ride." Gaither thereafter signed a written confession (R. 142–148).

The next day, February 28, 1956, Sage was returned to the North Las Vegas Police Department where appellant, Clifton, and Carlson continued the interrogation. Appellant did most of the talking (R. 86–87). Sage was informed that the police had secured a statement which implicated him in the burglaries. When confronted with this statement Sage agreed to sign a confession (R. 87). At this same time he was asked by appellant to give a statement concerning the cause of his injuries (R. 87–88). It was first sug-

[2] There also was evidence that appellant did not want Sage returned to the Henderson jail because of the bruises and that Sage was taken to the Las Vegas city jail instead (R. 181–182).

gested that he state that he jumped out of a car going at the rate of 50 miles an hour (R. 88). But he ultimately signed a statement to the effect that a slot machine had fallen on his chest and that no physical violence of any sort had been exerted against him (R. 89). Appellant told Sage he would put him on as a star witness if he would make a statement and also threatened to charge him with fourteen burglaries if he did not (R. 91–92).

When it became known that the grand jury was about to investigate the North Las Vegas police department, Carlson made two statements in contemplation of this grand jury investigation in order to get the "heat off" (R. 200–207). In early March, appellant, still attempting to cover up the atrocities, informed officers Clifton and Carlson that unless they "stuck" to their previous statements they would find themselves out in the desert (R. 187–189). Also Clifton and Carlson on instructions of appellant attempted to remove all of the evidence of the beatings by burning an old couch in a gully where the victims had been taken on February 27th (R. 192–193).

The evidence for the defense indicated the following: No one dictated any statement to Sage on the night of February 28 when he was being interrogated (R. 226). Witness Ferguson, Police Commissioner of the North Las Vegas police department, indicated that he did not see Sage's wounds until after they were pointed out to him (R. 227). Ferguson also testified that Gaither confessed when the large sack of money

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was shown to him (R. 228), and that Gaither had said that his stomach was upset because he had been drinking too much (R. 231).

Witness Leeds, District Officer of the North Las Vegas police department, testified that Sage did not leave the station at any time between 9 a. m. and 2:30 p. m. on February 27 (R. 237), and that he did not observe Sage being physically mistreated. Leeds saw no excessive amounts of dirt and gravel on Gaither's clothes and when Gaither returned with appellant and Carlson the only thing he noticed was that Gaither had loosened his tie (R. 239).

Witness Fisher, a member of the North Las Vegas police department detailed to guard Sage at the hospital in Henderson, stated that Sage told him that if he had known that they were going to guard him he would not have gone to the hospital. On cross-examination he testified that he had no occasion to see the physical appearance of the body of Sage at the hospital (R. 267–268).

Several exhibits which tended to impeach the credibility of two of the government's witnesses were introduced by the defense. Exhibits A and B were prior statements signed by Sage (R. 97, 99, 270). Exhibit A indicated that Sage could not positively identify the officers who subjected him to the beatings, and Exhibit B contradicted his story as to how he received his injuries. Exhibits C and D contained prior statements made by witness Carlson which tended to exonerate the police department as to the cause of the victims' injuries (R. 203, 274).

At the conclusion of the Government's case appellant's motion for a judgment of acquittal was denied (R. 223–224). The motion apparently was not renewed at the close of all the evidence. The jury found appellant guilty on both counts of the indictment (R. 307),[3] and appellant was sentenced to imprisonment for a period of one year on each count, the sentences to run concurrently (R. 309). A motion for a new trial was made, argued, and denied (R. 35). This appeal followed.

STATUTES INVOLVED

Title 18, section 242 provides:

Deprivation of rights under color of law.—Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Federal Rules of Criminal Procedure

Rule 26 provides:

Evidence.—In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of wit-

[3] The codefendant Clifton was also found guilty, but did not appeal.

nesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 30 provides:

Instructions.—At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52 provides:

Harmless Error and Plain Error—(a) *Harmless Error.*—Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.*—Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

1. The substantive offenses were properly alleged in the indictment, tried before the jury, and explained

by the court in its charge. The indictment did not allege that appellant actually obtained confessions by coercion, but merely that one of his acts in depriving certain persons of their rights guaranteed by the Fourteenth Amendment was to exert force and violence for the purpose of obtaining a confession. That being true, it was not incumbent upon the District Court to instruct the jury that they had to find appellant not guilty unless they found that the confessions were the result of force and violence. In all respects the instructions to the jury were fair and adequate and they correctly stated the law. And appellant cannot complain in any event since he failed to object to the charge, as required by Rule 30, F. R. Cr. P.

2. No error was committed with respect to the statement of George Dickerson, district attorney of Clark County, to the effect that when he advised the state grand jury in connection with the beatings here involved he told them that they had no jurisdiction because at most a misdemeanor was involved. Not only did appellant fail to object to the question—which fairly indicated the answer—but even more, the witness being a defense witness, any prejudicial effect cannot be attributed to the Government. Furthermore, the evidence of guilt herein was so overwhelming that it would be unreasonable to suppose that the single statement of Dickerson might have significantly influenced the result.

3. There was no error in the court's temporary exclusion of evidence which tended to impeach the witness Carlson during his cross-examination. The trial court

has almost absolute discretion in determining the order of proof at the trial. This alone is a sufficient answer to appellant's claim of reversible error. Furthermore, appellant's assertion of prejudice in this respect is factually defective, for (1) another inconsistent statement made by the witness was then and there admitted, and (2) the statement here involved was also ultimately admitted.

4. The District Court properly admitted the testimony of appellant's former wife. Since she was not married to appellant at the time of trial she was not incompetent to testfy. And no part of her testimony was privileged for all she saw and heard came to her attention in her capacity of secretary at the police department in the presence of a third person.

ARGUMENT

I

The substantive offenses were properly alleged in the indictment, tried before the jury, and explained by the court in its charge

Appellant's arguments II, III and VI, essentially make the same or closely similar points. Accordingly, they will be treated here as one.

It is asserted that there was (1) neither proof that the victims were forced to make a confession nor proof that the victims were denied the right to be tried in a duly constituted court and (2) that the court's charge failed to require the jury to find that such confessions were coerced or that the victims were deprived of the right to be tried in a duly constituted court. These assertions stem from the fact that the victims indicated that the confessions which they gave were not produced by the assaults, and

the fact that they ultimately were tried by a duly constituted court.

Preliminarily it should be stated—as appellant indeed concedes (Br. 28)—that no objection whatever was made to the charge as given. To overcome the positive mandate of Rule 30, F. R. Cr. P., which would be fatal to most of the points made, appellant relies on the "plain error" rule, codified in F. R. Cr. P. 52 (b). This Court has expressed its reluctance to permit the invocation of Rule 52 (b) to cure a failure to comply with Rule 30, except in very unusual circumstances. *Herzog* v. *United States,* 235 F. 2d 664 (9th Cir. 1956), *cert. denied,* 352 U. S. 844, 77 S. Ct. 54. It has been well said that the requirement of Rule 30 is not a trap for the unwary, but rather it "is of the very essence of the orderly administration of criminal justice." *Enriquez* v. *United States,* 188 F. 2d 313, 316 (9th Cir. 1951). That this is true cannot be doubted, for if in fact error is committed by the trial court, that court should have an opportunity then and there to correct itself. Our system does not permit defendants silently to select alleged errors and submit them for the first time in the appellate court.

In *Herzog, supra,* this Court indicated that only a miscarriage of justice or a denial of a fair trial would be a sufficient basis for invoking the plain error rule. And the case as a whole, not simply the specific error alleged, must be examined to determine its import and gravity. In this connection it should be pointed out that the essence of appellant's claim of error is that substantial rights were prejudiced because he was un-

der the impression that the Government to prove its case would have to show that the confessions were actually coerced; and that therefore he neglected to secure possible alibi witnesses (Br. 34). What appellant is saying is that throughout this case (indeed even in preparing for it) he felt sure that it was an essential element of the Government's proof to show that the confessions were the product of the brutal treatment. In view of that, what possible excuse can there be for his silence when the court in its charge failed to impose this burden upon the prosecution? Unless it were to be assumed that counsel was incompetent (and there is no claim of that) then the only explanation for this silence is that he deliberately elected to have the court persist in its error (if, as is claimed, there was error in this regard) in the hope of obtaining a reversal on appeal. A more cogent case for rigid adherence to the mandate of Rule 30 and a refusal to apply Rule 52 (b) would be hard to construct.

Accordingly, it is respectfully submitted, the questions raised in appellant's Arguments II, III and VI, are not properly presented for review by this Court.

In any event, no error, "plain" or otherwise, was committed by the District Court. The basic premise underlying appellant's major arguments is that the indictment herein must be construed as requiring the Government to prove that appellant actually extorted confessions by the use of force and violence (Br. 46). In other words, appellant reads the indictment as charging him with mistreatment crowned with success: the securing of confessions as a result of the

brutality. If this premise is accepted, then it might logically follow that the court failed to explain and define the offense (Argument II); that there was a variance between the indictment and the proof (Argument III); and that the court amended the indictment in its charge (Argument VI).

But, it is submitted, appellant's premise is wholly erroneous and so are his conclusions. The indictment does not, expressly or impliedly, charge appellant with the successful coercive securing of a confession. Rather, it charges a deprivation of rights secured by the Constitution, which, in one aspect, amount to the right to immunity "from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws for the purpose of obtaining a confession, statement, or information about an alleged offense" (R. 4, 5). It is obvious that this language of the indictment, which was read *in toto* to the jury (R. 6–9), neither suggests nor charges that appellant *obtained* a confession by use of force and violence, but only that the illegal acts deprived the victims of liberty without due process, which includes the right to be immune from force and violence applied *for the purpose of obtaining,* or in order to obtain, a confession.[4] It is plain that the indictment cannot be read as appellant would have it.

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[4] There was ample evidence from which the jury could find that the victims had been subjected to police brutality the intent and purpose of which was to deprive them of the right to be immune from force and violence applied in order to secure a confession. For example, the record reflects repeated questions by appellant to Sage during the beating asking him whether he was ready to talk about the burglary (R. 60–66).

Moreover, it would be anomalous indeed if, before a successful prosecution could be had under 18 U. S. C. 242, it were required that the corrupt official succeed in his illegal purpose of coercing a confession. If this were true, a person who does not succumb to the brutalities inflicted on him and consequently does not confess, could have no vindication of the rights which were denied him. Only the weak would be able to see their tormentors successfully prosecuted. The right which is involved here is not the right to have a conviction reversed if a confession leading to such conviction is illegally coerced [5] but rather the right to immunity from police brutality and illegal coercion in the first instance. 18 U. S. C. 242 is designed as a deterrent to prevent such violations, whether or not the culprit is successful. Willful brutality and mistreatment under color of law and office with the intent of depriving the victim of his Constitutional rights are as illegal and as heinous whether or not the objective of obtaining a confession is achieved.

It is significant that *Apodaca* v. *United States,* 188 F. 2d 932 (10th Cir. 1951), a case upon which appellant relies, had a similar allegation in the indictment, i. e., "for the purpose of forcing him to confess". The court, in discussing at length the question of the sufficiency of the evidence to support the verdict under the indictment did not relate that the defendants were successful in their illegal endeavor.

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[5] Other rules of law deal with that problem. See *Stein* v. *New York*, 346 U. S. 156, 73 S. Ct. 1077 (1953); *Hopt* v. *Utah*, 110 U. S. 574, 4 S. Ct. 202 (1884).

It simply found that the evidence was sufficient to support a conviction on the indictment. The fact is that Apodaca never succeeded in obtaining a confession, coerced or otherwise. Yet the court had no difficulty in sustaining the conviction.

Language from Justice Rutledge's concurring opinion in *Screws* v. *United States,* 325 U. S. 91, 65 S. Ct. 1031 (1945) also is particularly *apropos* to this point. Confronted with the contention that there was no deprivation of constitutional rights but rather a violation of state law he had this to say (325 U. S. at 114):

> In effect, the position urges it is murder they have done, not deprivation of constitutional right. Strange as the argument is the reason. It comes to this, that abuse of state power creates immunity to federal power. Because what they did violated the state's law, the nation cannot reach their conduct. * * *
>
> The defense is not pretty. Nor is it valid.

The appellant here was not tried for a violation of state law—and neither was Screws. Yet in effect appellant assumes that because he failed to obtain a coerced confession (a proposition which in itself is dubious from the evidence (R. 144–147)) he has committed no offense. This defense is not pretty and it is not valid.

Had the appellant in this case succeeded in obtaining a confession such fact might well have had a bearing on the question of whether there was a deprivation of constitutional rights. But even then it would have been only one of the attendent circumstances from which the jury could find bad motive.

Cf. *United States* v. *Screws, supra.* But obviously this was not the only method of proving evil motive. And the jury was adequately instructed in this matter (R. 16–17).

In this connection it might bear reiterating precisely what the indictment alleges. Appellant was charged with the "deprivation of the rights and privileges secured * * * by the * * * Constitution * * * not to be deprived of * * * liberty without due process of law" (R. 4, 5). The indictment then specifies with particularity what rights and privileges encompassed within the great concept of the Fourteenth Amendment right were violated by this appellant (R. 4, 5):

> to wit, the right and privilege to be secure in his person while in the custody of anyone acting under color of the laws of the State of Nevada, the right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws for the purpose of obtaining a confession, statement, or information about an alleged offense, and the right and privilege to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Nevada, and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada.

Finally, the indictment shows exactly in what manner appellant accomplished this illegal deprivation of rights: in the case of Sage, by beating and kicking

him, with fists, elbows, flashlight and feet (R. 4), and in the case of Gaither, by beating and kicking him with fists, elbows, and feet (R. 5–6).

That this is the usual, the "classical", method by which violations of 18 U. S. C. 242 are charged and proved, is unquestionable. In the leading case of *Williams* v. *United States,* 341 U. S. 97, 71 S. Ct. 576 (1951), the Supreme Court stated (341 U. S. at 101):

> * * * where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court.

Even there, where a confession was in fact obtained by coercion, the right involved was described by the Court simply as the general right to be tried by a legally constituted court.

Similarly, in *Screws* v. *United States, supra,* the Court had this to say (325 U. S. at 106):

> * * * it is plain that basic to the concept of due process of law in a criminal case is a trial—a trial in a court of law, not a "trial by ordeal." *Brown* v. *Mississippi,* 297 U. S. 278, 285. It could hardly be doubted that they who "under color of any law * * *" act with that evil motive violate § 20 [now § 242]. Those who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him.

In the instant case, appellant was informed in the indictment and the jury was informed in the charge not only of the general constitutional right involved (the Fourteenth Amendment); but the specific "included" rights were fully detailed and the factual pattern of the deprivation was alleged, charged and proved. This was even more than appellant was entitled to, for as *Screws* indicates, it is necessary to spell out the specifics of the constitutional rights involved only in the charge (as distinguished from the indictment).

The instructions here were in full compliance with the requirements laid down in *Screws* and *Williams*.[6] It was made unequivocally clear that appellant was on trial not for any violation of the laws of Nevada, not for assault under any law of the United States, but solely for violating the right of the victims not to be deprived of liberty without due process in violation of the Fourteenth Amendment (R. 10–11). The court further told the jury that certain specific constitutionally protected rights were involved, the deprivation of which had to be proved before appellant could be found guilty (R. 13).[7] The court then defined the

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[6] It is a fact of some significance that the jury instructions in the instant case were patterned after those which were upheld in *Crews* v. *United States*, 160 F. 2d 746, 750 (5th Cir. 1947).

[7] At one point appellant suggests that the court was required to give a specific charge on each of the three rights enumerated in the indictment. Even aside from the fact that they are concomitant parts of the right to an orderly trial and not a trial by ordeal, this contention is without merit. Appellant gives as the reason for such requirement the fact that the rights were pled in the conjunctive (Br. 46). Even in the case where a statute enumerates specific acts in the disjunctive, all of them

term "wilfully" in words highly favorable to appellant, charging that to convict the jury had to find that appellant

> * * * had in mind the specific purpose of depriving [the victims] of a Constitutional right, that is, to deprive [them] of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed (R. 16).[8]

In its summarization, the court again emphasized what the Government had to show in addition to the commission of the specific acts alleged in the indictment (R. 18):

> 1. Were the victims taken into custody under color of law?
> 2. Did the defendants specifically intend to deprive the victims of a constitutional right guaranteed them by the Constitution?
> 3. Have the elements been proved beyond a reasonable doubt?

It is apparent that, reading the charge as a whole,[9] it defined and explained with great care and accuracy

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may be pled in the indictment in the conjunctive even though the proof supports only one. *Heflin* v. *United States*, 223 F. 2d 371 (5th Cir. 1955); *United States* v. *Krepper*, 159 F. 2d 958 (3d Cir. 1946), *cert. denied*, 330 U. S. 824, 67 S. Ct. 865 (1947); *Price* v. *United States*, 150 F. 2d 283 (5th Cir. 1945), *cert. denied*, 326 U. S. 789, 66 S. Ct. 473; *Bailey* v. *United States*, 5 F. 2d 437 (5th Cir. 1925), *cert. dismissed*, 269 U. S. 589, 46 S. Ct. 12; *O'Neill* v. *United States*, 19 F. 2d 322 (8th Cir. 1927).

[8] See also, at R. 17: "The proof of a general intent to do Sage and Gaither wrong is not sufficient, but a specific intent to deprive them of a Constitutional right is a burden the law casts upon the Government in this case."

[9] Compare, appellant's brief, pp. 32–33.

the elements of the prosecution's proof. It hardly merits appellant's characterization that it constitutes "plain error." In fact it was a careful, accurate and fair charge, free from error.

II

No error occurred in connection with the testimony of George Dickerson

Appellant complains of prejudicial error in the testimony of George Dickerson, district attorney of Clark County. The circumstances under which this testimony was given were as follows: Dickerson was called as a witness on behalf of appellant's codefendant Clifton. Clifton's counsel asked Dickerson whether he had had occasion to advise the Clark County grand jury regarding an investigation of the North Las Vegas Police Department in the Spring of 1956 with reference to the beating of two prisoners held in the custody of the North Las Vegas Police Department in February and March, 1956 (R. 257–258). Dickerson replied "In part, yes" (R. 258). Thereafter counsel sought to introduce through the witness the original of a statement signed by Sage which had been submitted to the Clark County grand jury, and ultimately this statement was produced and received in evidence (Exhibit B) (R. 270). On cross-examination by the Government the prosecutor asked the witness what he meant when he stated that he had participated "in part" in the matter of the presentation of this matter to the Clark County grand jury. Dickerson replied, "I was not present during any time when the evidence was submitted. I was present outside after the conclusion of the matter. Questions as

to the legal problems involved, as to what crimes, if any, could be determined by the grand jury were asked of me, at which time I informed the grand jury that it was without jurisdiction to entertain any action in this regard, in that the evidence adduced constituted at the most a misdemeanor offense; that the grand jury is an arm of the district court and can return an indictment only on matters tried with the district court" (R. 271). Counsel for appellant then objected and demanded that the answer be stricken on the ground that the witness's legal opinion in the matter of the state law of Nevada was not proper. The court ruled that inasmuch as counsel had permitted the question to go in without objection, he could not for the first time complain after the answer to the question turned out to be unfavorable to his client (R. 271–272). It is this ruling of the trial court which appellant considers to be reversible error.

The court's ruling was correct not only on the narrow ground stated but for many other reasons as well. Obviously when the witness was requested to explain what he meant by his observation that he had participated in part in the matter of the presentation of the case to the county grand jury, an answer explaining the role of the witness and the grand jury proceedings themselves had to be anticipated. No doubt, counsel did not object because he felt that the witness might simply reveal that as a result of his advice, the grand jury did not indict. On this, he gambled and lost, for the witness gave a reason for his advice which was perhaps not

as favorable as counsel might have expected. But in any event, it seems clear that having stood idly by while the question calling for just such an answer was asked, appellant could not complain after the answer itself had gone into the record.

Moreover, and perhaps more basically, it is difficult to see how the Government could be charged with this matter at all, even if, *arguendo,* appellant's theory of error were assumed to be justified. *George Dickerson was not a Government witness.* He was called by the defense. He never became a witness for the prosecution at this trial and, except for the fact that he happens to be a state law enforcement officer, he has no ties and no connection with the Government in this case. Appellant cites no case in any court and appellee has been unable to find any decision holding that an improper volunteered statement by a defense witness—no matter who he might be—could be imputed to the prosecution so as to serve as a basis for reversing a conviction. There is sound reason for this lack of authority. It has always been true that a party is responsible for the witnesses it calls. If the rule were otherwise, abuses and schemes for inducing reversible error too manifold to be imagined could, and no doubt would, occur. It has never been held that a witness becomes a witness hostile or adverse to the defense by the mere fact that he happens to be engaged in law enforcement for another sovereign or even for the same sovereign. Hostility of a witness even for cross-examination purposes must first be established by his behavior on the stand, and a claim of surprise

is required. *Young* v. *United States,* 97 F. 2d 200 (5th Cir. 1938); cf. *Beasley* v. *United States,* 218 F. 2d 366, 368 (D. C. Cir. 1954), *cert. denied,* 349 U. S. 907, 75 S. Ct. 584 (1955). In the instant case it was not claimed at any time during the trial that Dickerson was hostile to the defense. His testimony therefore cannot be attributed to the Government.

It must be remembered also that what occurred between the district attorney and the Clark County grand jury was brought into the trial not by the Government but by the defense. It was defense counsel who first asked Dickerson about the grand jury investigation of the beating of the two prisoners (R. 257). Appellant states that he had to raise this matter in order to lay a foundation for his request for the original of Sage's statement. That may well be, or it may also be that an attempt was being made subtly to indicate to the jury in the instant case that this matter had previously been taken up by a state grand jury without any positive result. In any event, since the defense had opened up the subject it was the right, and indeed the duty of the Government to clarify the reference to Dickerson's role in the state grand jury proceedings.

Appellant refers to the proposition that "the evidence of guilt in this case was not clear" (Br. 21), in an effort to bring himself without the generally recognized doctrine that where improper statements are volunteered by a Government witness, the appellate court will reverse only if it can reasonably be assumed that absent such statement, the jury would probably not have convicted. Short of having a tele-

vision camera trained on the spot where the beatings occurred it is hard to imagine more positive and clear-cut evidence of the commission of a crime (see generally, Counterstatement of Facts, at pp. 2–4). Sage and Gaither, the two victims of appellant's acts, testified in considerable and graphic detail as to the events preceding, surrounding and following the beatings (R. 58–71, 135–137). Sage's testimony in regard to the brutality inflicted upon him was corroborated by that of Dr. French, who examined Sage and found a great many bruises and other injuries (R. 77–79, and see also and especially his testimony under cross-examination at R. 81–82). Both Sage's and Gaither's testimony was corroborated by Detective Sergeant Carlson, an accomplice of appellants, who was present during the beatings and who struck some of the blows himself (R. 167–174). Sage's story was further corroborated by the photographs and slides taken of him in his injured condition (R. 222–224). Finally, appellant's own secretary (his former wife) corroborated portions of Sage's and Gaither's testimony (R. 212–214). Opposed to this overwhelming evidence, appellant advances nothing more than the fantastic story that Sage received his injuries by attempting to jump out of a police car travelling at the rate of 50 miles per hour or that the injuries resulted from the fact that a slot machine fell on his chest. Truly, as one of the jurors said in an affidavit filed in connection with appellant's motion for a new trial, "with the evidence presented to the jury, we had no choice but to render the verdict we did. There was no argument in the juryroom whatsoever, and that had

the same evidence been presented against my own brother I would have to vote as I did" (R. 27). A feeling such as that could hardly have been caused or significantly influenced by the comment of Dickerson that he had informed the grand jury that "at the most, a misdemeanor might have been committed."

This comment was fairly innocuous in itself; in the setting of this case to assume that it might have been responsible for the conviction would be wholly unwarranted.

III

There was no reversible error in the trial court's temporary exclusion of evidence to impeach Witness Carlson durin his cross-examination

Appellant offered impeaching evidence (Exhibit C) during the cross-examination of the witness Carlson (R. 200). The trial court excluded it, at that time, on the ground that a proper foundation had not been laid for its admission (R. 200–203). Subsequently the exhibit was admitted (R. 274–275).

Appellant concedes that the time of admitting evidence in general and an impeaching statement in particular is within the discretion of the trial court (Brief p. 42). Of course this is so, no principle of law being more firmly established than that the trial court has the widest possible discretion in determining the order of proof. *Philadelphia and Trenton Ry.* v. *Stimpson,* 39 U. S. 448, 462 (1840); *Brattelien* v. *United States,* 147 F. 2d 888, 893 (8th Cir. 1945) ("wholly within the discretion of the trial court"); *United States* v. *Manton,* 107 F. 2d 834, 844 (2nd Cir. 1939), *cert. denied,* 309 U. S. 664, 60 S. Ct. 590; *Tingle* v. *United States,* 38 F. 2d 573, 575 (8th Cir.

1930). No facts are shown or are apparent which would warrant the conclusion that the trial court abused its discretion in this case.

Aside from this controlling factor of the District Court's discretion and the fact that no abuse has been shown, there is yet another, equally basic infirmity in appellant's argument. The argument assumes that the temporary exclusion of this impeaching evidence was prejudicial. Obviously, any error, assuming *arguendo* there was error, must affect substantial rights of the appellant before reversal could be expected. F. R. Cr. P. 52 (a).

As previously stated, the principal purpose of this offer of evidence was to impeach witness Carlson. At the time Exhibit C was temporarily excluded, the court admitted into evidence Exhibit D (R. 203), which was essentially of the same purport as Exhibit C. No tactical advantage lost by the momentary exclusion of Exhibit C was substantial, for the jury had before it at that time evidence (Exhibit D) which was as impeaching of the credibility of Carlson as was Exhibit C. Both exhibits were designed to demonstrate that Carlson had previously made statements at variance with his trial testimony—statements exculpatory to appellant. Carlson explained that both documents were drawn up "to get the heat off us from the County grand jury" (R. 198–199). Having Exhibit D before it, the jury positively knew that on at least one occasion Carlson had told a story conflicting with his trial testimony, and they further knew, from the reference to the fact that there was an Exhibit C which was "a statement we had to make under direc-

tion, on order, from Pool and Clifton, to get the heat off us from the County grand jury" (R. 198) that there was another statement substantially of the same import. Accordingly, Exhibit C was merely cumulative. In fact, it merely presented in capsule form what Exhibit D contained. Exhibit D was much more comprehensive, hence more persuasive as an impeaching document. The action of the court could hardly be said to have affected any substantial rights or prejudiced appellant in any way. And, it should be remembered, Exhibit C *was* subsequently admitted into evidence.[10]

There was neither error, nor abuse of discretion, nor prejudice.

IV

The district court properly admitted the testimony of appellant's former wife

Ramona Wolf, appellant's former wife, was called to testify by the prosecution concerning her observations at the police department in her capacity as secretary to Chief Pool, the appellant. After preliminary questioning, appellant moved that she not be permitted to testify against her former husband on grounds of incompetency. And he further suggested that a question of confidential communications was thus raised (R. 209).[11]

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[10] In another connection, appellant complains (Br. 21) that certain allegedly damaging evidence was admitted at the end of the trial, which, he implies, was prejudicial because a matter would more likely remain impressed in the minds of the jurors if they heard it just before retiring than otherwise. It may not be amiss to point out that Exhibit C was the last fragment of evidence admitted at the trial (R. 274–275).

[11] Actually it is not too clear on which of the two grounds appellant relied.

Obviously no question of witness Wolf's competency was involved, for at the time of his trial she was no longer appellant's wife (R. 209). Divorce removed the bar of incompetency. *Pereira* v. *United States*, 347 U. S. 1, 6, 74 S. Ct. 358 (1953). Furthermore, at this juncture of the trial no question of confidential communications could be raised for the witness had not been asked to reveal any information that was in fact privileged (R. 207–208). The trial court so found (R. 210). The court further ruled that the witness would not be allowed to testify as to matters in the nature of confidential communications between herself and her former husband (R. 210), and the prosecutor, before proceeding with the interrogation, instructed the witness not to answer with respect to any matter which was in the nature of a confidential communication between herself and appellant (R. 210).

During the subsequent testimony of the witness no objection whatever was made by the appellant.[12] Accordingly, even if it were assumed that the witness revealed privileged information appellant cannot now assert error in its admission. If the privilege could have been claimed, appellant should have sought a ruling on the specific testimony he wanted excluded.[13]

In any event the testimony given by the witness Wolf did not violate the privilege protecting private

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[12] This may throw some light on whether appellant believed any of the testimony was privileged.

[13] Incidentally appellant has not complied with Rule 18 (d) of this Court since he failed to indicate the full substance of the evidence allegedly erroneously admitted. *Gowdy* v. *United States*, 207 F. 2d 730 (9th Cir. 1953).

communications between husband and wife. Essentially her testimony (R. 211–215) involved only what she observed at the police station. In the few instances when the witness was asked to testify as to what the appellant said to her she was asked to state preliminarily who was present at that time; and in every case Gaither, one of the victims, was present (R. 212).

It is undoubtedly true that as a general rule marital communications are presumed to be confidential. But this presumption is overcome by facts showing the statements were not intended to be private. The Supreme Court held in *Pereira* v. *United States, supra,* that the presence of a third party negatives the presumption of privacy.[14] See also, *Wigmore,* Evidence, § 2336; *Wolfle* v. *United States,* 291 U. S. 7, 14, 54 S. Ct. 279 (1934); *Himmelfarb* v. *United States,* 175 F. 2d 924, 939 (9th Cir. 1949) *cert. denied,* 338 U. S. 860, 70 S. Ct. 103 (attorney-client privilege); *Tabbah* v. *United States,* 217 F 2d 528 (5th Cir. 1954). The above cited decisions further indicate that before the privilege attaches to any communication it must have been made by virtue of the marital relation. In the instant case nothing was said or done under circumstances surrounding it with any of the indicia of confidentiality.

The witness in her testimony related only the following observations she made in her capacity as typ-

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[14] The applicable law in determining competency or privilege in federal criminal cases is "the common law as * * * may be interpreted by the Courts of the United States in the light of reason and experience." F. R. Cr. P. 26.

ist, chief stenographer, and secretary for the North Las Vegas police department: Gaither was brought to the police station on the morning of February 27. After interrogating Gaither for a while appellant dictated a statement to her which Gaither signed. Then appellant told Gaither that they would go for a ride and the two men left the station. After an hour or so they returned and she observed that Gaither's face was then flushed and red. As far as Sage is concerned, she only saw him once on February 27, sitting in a police car with appellant Clifton and Carlson. This was the extent of her testimony (R. 211–215).[15] Clearly, none of this was a confidential communication of the kind protected from disclosure as an incident of the marital relationship.

Finally, it has been held that the privilege in question attaches in general only to utterances not acts. *Pereira* v. *United States, supra,* 347 U. S. at 6. Aside from the fact that appellant told the witness to take a statement from Gaither which was dictated by Pool, none of her testimony involved any communications directed to her.[16] The innocuous request to take dictation can hardly be construed as a confidential communication, for it obviously did not in any sense come to her by virtue of the marital relation, but rather by virtue of the fact that she was appellant's secretary. In fact, nothing to which she testified came to her in any other capacity.

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[15] There was no cross examination (R. 215).

[16] The content of the statement dictated was not revealed by the witness in her testimony.

Accordingly, it is submitted that there is no merit to appellant's complaint in regard to Ramona Wolf's testimony.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment below be affirmed.

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